Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

PETITION FOR RECONSIDERATION AND CLARIFICATION

Submitted by:

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SUMMARY

Duquesne Light Company generally concurs with the Commission's decision not to adopt detailed national rules governing pole attachments, but rather to rely on the well-established complaint procedures to resolve disputes as they arise. Duquesne nevertheless requests that the Commission reconsider and clarify the rules adopted in CC Docket No. 96-98 as follows:

1. The Commission should reconsider the requirement that an electric utility exercise its power of eminent domain on behalf of telecommunications carriers because: (i) just compensation of the utility will require more than the mere reimbursement of expenses; (ii) Section 224(h) does not provide authority for the Commission's action; (iii) the nondiscrimination principle should preclude requiring a utility which does not exercise the power of eminent domain on its own behalf to exercise it on behalf of a telecommunications carrier; (iv) Pennsylvania law does not provide Duquesne the power of eminent domain except for the purpose of providing electric service.
2. The Commission should clarify its notice and compensation rules by making clear that if a modification is required by a third party, the utility must give only the notice that is practical under the circumstances, and that all attaching entities must share proportionately in the cost of modifying the facility and must bear the entire cost of shifting its attachment to the new facility. The Commission should clarify its make-ready cost allocation rules (i) with respect to what constitutes a violation under the National Electric Safety Code; and (ii) the allocation of make-ready costs if a code violation could be corrected on the unmodified facility within the capacity actually used by the utility on that facility.
3. The Commission should clarify its rule on nonutility workers to make clear that a utility (i) may establish reasonable qualification standards; (ii) may ensure that the telecommunications carriers' workers meet those standards; and (iii) may require the telecommunications carrier to indemnify or bond against damage to the utility's system caused by its workers and against personal injury claims of such workers.
4. The Commission should clarify that certain innovative attachments, because of the burden they place on utility facilities, should be counted as more than one attachment.
5. The Commission should clarify that telecommunications carriers are required to gain utility concurrence before making attachments, and must label their attachments.

6. The Commission should make certain technical clarifications including: (i) specifying which language is effective in two instances in which it adopted different language in the same sections of its rules in CC Docket No. 96-98 and CS Docket No. 96-166; and (ii) usage of the term "attachment" should be clarified to indicate that such usage incorporates the defined term "pole attachment"

In addition to the above points, Duquesne Light Company specifically includes by reference and adopts the Joint Petition for Reconsideration and Clarification being submitted on September 30, 1996 by the Edison Electric Institute and UTC, The Telecommunications Association.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Duquesne Light Company ("Duquesne"), by its attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended, and Section 1.425(a) of the Commission's Rules of Practice and Procedure, codified at Title 47, Code of Federal Regulations, hereby petitions the Commission to reconsider and clarify the rules adopted on August 1, 1996 and released on August 8, 1996 in the First Report and Order in the above-captioned docket, as detailed more fully below. Duquesne's petition is limited to that portion of the First Report and Order which deals with access to rights-of-way.[1/]

I. INTRODUCTION

Duquesne Light Company is an electric utility engaged in the production, transmission, distribution and sale of electric energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. In addition to serving more than 580,000 retail customers, the company sells electricity at wholesale to

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[1/]In petitioning for reconsideration and clarification, Duquesne does not concede that the mandatory access provisions of Section 224, or the rules promulgated thereunder, are constitutional.

other utilities. Duquesne is a forward-thinking utility which has introduced one of the first comprehensive customer service guarantee programs in the nation. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Duquesne has a vital interest in the outcome of this proceeding. Duquesne participated in this proceeding by submitting its Comments on May 20, 1996, and (as a member utility of the Edison Electric Institute ("EEI") and UTC, The Telecommunications Association ("UTC")) through the joint comments and reply comments submitted by EEI and UTC on behalf of their individual members.

Duquesne commends the Commission for its well-reasoned decision, as proposed in comments submitted by the electric utility industry and many others, not to adopt detailed national rules, and to use instead the well-established complaint procedures to adjudicate individual disputes as they arise. Because of the wide diversity of factual situations which will arise, the FCC's decision is in the best interests of both the electric utility industry and telecommunications service providers. However, Duquesne requests reconsideration or clarification of certain rules and guidelines adopted by the Commission, as more fully described below.

II. ADOPTION OF THE JOINT PETITION FOR RECONSIDERATION AND CLARIFICATION SUBMITTED BY THE EDISON ELECTRIC INSTITUTE AND UTC

Duquesne incorporates by reference and adopts herein the Joint Petition for Reconsideration and Clarification being submitted by EEI and UTC on September 30, 1996. To the extent, if any, that there are any inconsistencies between the EEI/UTC Joint Petition and this Petition, Duquesne's position is as set forth herein.

III. THE COMMISSION SHOULD RECONSIDER ITS MANDATE THAT ELECTRIC UTILITIES MUST EXERCISE THE POWER OF EMINENT DOMAIN ON BEHALF OF TELECOMMUNICATIONS SERVICE PROVIDERS

The Commission concluded that a "utility should be expected to exercise its eminent domain power to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments." [2/] The Commission justified this sweeping preemption of state property law by asserting that Congress "seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that 'intends to modify or alter such . . . right-of-way . . . ."[3/] The Commission should reconsider the requirement that electric utilities be required to exercise the power of eminent domain on behalf of telecommunications service providers because (i) exercise of eminent domain involves the expenditure of significant commercial goodwill and company resources; (ii) Section 224(h) cannot reasonably be interpreted to provide authority for the Commission's action; (iii) the principle of nondiscrimination precludes forcing a utility which never exercises the power of eminent domain on its own behalf to exercise it on behalf of a third party; and (iv) under Pennsylvania law and the law of most other jurisdictions, state law provides electric utilities the power to condemn private property only for use in its core electricity business.

[2/]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, slip op. at 568 ¶ 1181 (CC Docket No. 96-98 Aug. 8, 1996)

[3/]Id. (citing 47 U.S.C. § 224(h)).

A. Just Compensation For An Electric Utility Forced to Exercise The Power of Eminent Domain for a Telecommunications Service Provider's Benefit Will Require More Than Mere Reimbursement of Expenses

The Commission's ruling creates a two-tiered takings problem. In the first tier, the real property of an underlying landowner is taken in the state condemnation proceeding, and the landowner is compensated by the utility. In the second tier taking the utility must be fairly compensated for a taking of intangible property which has great value.

In the second tier taking, what is taken from the utility is more than the ad damnum award compensating the landowner for the loss of real property rights. First, there are the direct costs of maintaining the action, which includes the cost of executive and management time, the costs associated with the landowner,[4/] court costs, outside counsel fees, and time spent by inside counsel monitoring the action. The Commission should note that these costs will be incurred and must be reimbursed even if the eminent domain action is unsuccessful. More importantly, however, the utility pays a grave political and commercial price as a result of the adverse publicity that invariably accompanies contested condemnation actions. In the emerging world of retail electric competition,[5/] this will translate into a loss of goodwill in the marketplace that will have a direct and adverse impact on market share. Utility goodwill has been treated as property in the courts.[6/]

[4/]Pennsylvania law requires a utility to negotiate extensively with the landowner before it can approach the Pennsylvania Public Utility Commission for a certificate of need that will permit the utility to maintain an eminent domain action in the Court of Common Pleas. It must also provide the landowner a notification of rights and allow a specified notice period to lapse before commencing the action. See 52 Pa. Code § 57.91 (1996).

[5/]The Pennsylvania Public Utility Commission has already opened a proceeding that may lead to electric competition at the retail level. See Re Electric Power Competition, Docket No. I-940032, 166 P.U.R.4th 362 (Pa. Pub. Util. Comm'n 1995).

[6/]In Minnegasco v. Minnesota Public Utilities Commission, 529 N.W.2d 413, 417-19 (Minn. App.

Footnote continued on next page

Given the huge volume of utility electricity sales, even a very minor loss of market share due to loss of goodwill would open the floodgates for very substantial compensation.

B. Section 224(h) Cannot Support the Commission's Sweeping Grant of the Power of Eminent Domain to Telecommunications Service Providers and Preemption of State Property Law

The Commission relies upon the following language to justify its action::

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment.

Telecommunications Act of 1996 § 703 (to be codified at 47 U.S.C. § 224(h)) (emphasis added).

The language of the statute does not support the Commission's interpretation that it can force a utility to exercise the power of eminent domain on behalf of a telecommunications carrier. First, the portion of Section 224(h) upon which the Commission relies for authority establishes no more than notice requirements pertaining to an intended modification. The express object of Section 224(h) is so far afield from a grant of authority to the Commission to coerce the exercise of eminent domain, even reading it together with the "necessary and proper" clause in Section 4(i),

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1995), the Minnesota Court of Appeals affirmed a Minnesota PUC decision forcing a nonregulated utility subsidiary company to compensate the utility for the goodwill associated with the use of the utility's name, which was determined to be an "asset." Since the mere use of the name requires compensation for loss of goodwill, destruction (or partial destruction) of goodwill itself must be compensable.

the Commission's interpretation fails under the analysis in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).[7]

Moreover, in permitting telecommunications carriers vicariously to exercise the power of eminent domain, the Commission is treading in territory in which its usual considerable deference under Chevron is significantly attenuated. By stating that Congress only "seems to have contemplated" the forced use of eminent domain,[8] the Commission clearly admits that its action is based on an interpretation of statutory silence rather than on an explicit grant of authority. Because the Commission's ruling certainly grants telecommunications service providers the authority to effect a taking, it clearly raises a substantial constitutional question under the Just Compensation Clause of the Fifth Amendment relative to compensation of the electric utility (see discussion supra at Part III.A).

Moreover, the Commission has no legal authority to enforce the use of eminent domain by electric utilities. In 1992, the Commission similarly attempted to provide competitive access providers with the power to effect a taking by making physical collocation of their interconnection facilities in central offices of local exchange telephone companies mandatory.[9] Bell Atlantic and

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[7]Chevron holds that an agency interpretation of the statute it is charged with enforcing is entitled to deference if two conditions apply. First, Congress must not have spoken directly on the issue in the statute itself. Second, the agency's interpretation must be a permissible construction of the statute to which Congress would not object. 467 U.S. at 842-43. The Commission's use of notice provisions in a statute to justify preempting state eminent domain law is so far afield from the subject of notice that a court could readily conclude that this interpretation is not one that Congress would countenance, thus violating Chevron's second step.

[8]See First Report and Order at 568 ¶ 1181.

[9]See Expanded Interconnection With Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 7369, 7389-94 (1992) ("Interconnection Order").

other LECs appealed on the basis that the Commission lacked authority to require LECs to permit physical collocation upon demand; the Commission defended on the basis of its general power to order interconnections, invoking Chevron deference to justify its statutory interpretation.[10/] The D.C. Circuit reversed and remanded on the basis that an administrative interpretation cannot create a class of cases in which application of a statute will constitute a taking, and that to permit Chevron deference to such agency actions on the basis of statutory silence or ambiguity would "expose the Treasury to liability both massive and unforeseen." [11/]

The Commission's proposed action in this instance is different only in that it creates a two-tiered taking rather than the more direct scheme the Commission adopted in the Interconnection Order. In the first tier, the landowner would be compensated by the utility under the usual eminent domain valuation proceedings under state law.[12/] In the second tier, however, no provision is

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[10/]Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1444-45 (D.C. Cir. 1994) ("Bell Atlantic").

[11/]Id. at 1445 (citations omitted).

[12/]The Commission should note, furthermore, that its ruling certainly preempts existing state eminent domain law, because it provides telecommunications service providers the power of eminent domain by proxy. Pennsylvania precedent specifically precludes a corporation with eminent domain power from exercising it on behalf of a third party which has no eminent domain power. Pittock v. Central District & Printing Telegraph Co., 31 Pa. Super. 589, 596 (1906). The Commission's action does not pass the tests established by the Supreme Court in City of New York v. FCC, 486 U.S. 57 (1988) and Louisiana v. FCC, 476 U.S. 335 (1986), in that Congress did not specifically authorize the FCC to preempt state law. It is quite a stretch to assert that preemption of state eminent domain law is necessary in order to effectuate the pole attachment scheme enacted by Congress. The Commission should take particular note of the Court's reasoning in Louisiana in striking down an attempted preemption of depreciation rules for intrastate rate purposes. In holding that the statute upon which the Commission had relied did not provide authority to preempt state law, the Court noted that the statute neither mentioned intrastate ratemaking nor used the word "preemption." 476 U.S. at 377. Similarly, Section 224(h) neither mentions eminent domain nor uses the word "preemption."

made for just compensation of the utility, which, as discussed in Part III.A above, requires greater compensation than mere reimbursement of the ad damnum paid to the underlying landowner. It is this second tier taking which raises the constitutional provision that the Commission violated in Bell Atlantic.

C. Even If The Commission Requires Utilities to Exercise Eminent Domain Power, the Nondiscrimination Principle Requires that the Commission Not Require Such Use on Behalf of a Telecommunications Services Provider if the Utility Does Not Exercise Eminent Domain for its own Business Purposes

After consideration of over 2,000 pages of comments, the Commission recognized the nondiscrimination principle that a utility which denies access to its infrastructure to all telecommunications carriers discriminates against none.[13/] Assuming arguendo that the Commission has authority to order utilities to exercise eminent domain on behalf of telecommunications carriers, the Commission should apply the same nondiscrimination principle to except from that requirement utilities which do not exercise the power of eminent domain on behalf of any party, including itself.

Attempted exercise of the power of eminent domain can have a severe impact on the utility's public image, if contested. Many utilities have adopted a practice that they will never exercise eminent domain, even to support their own core electricity business, and, in fact, have not done so for decades. Such a utility does not discriminate against a telecommunications carrier by refusing to exercise its power of eminent domain on the carrier's behalf if it does not use that power for its own business. If the Commission persists in insisting that utilities be required to exercise the power of eminent domain to provide right-of-way for telecommunications carriers, it

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[13/] See First Report and Order, slip op. at 565 ¶ 1173.

should establish a "safe haven" in this rule for utilities that have an established corporate practice not to use the power of eminent domain.

D. The Commission Should Recognize That State Law Permits Electric Utilities To Exercise Eminent Domain Only To Support Their Core Electricity Business

Duquesne's final objection to the Commission's ruling is a very practical one. Pennsylvania law, like the law of many (if not most) states, does not give Duquesne and other Pennsylvania electric utilities unlimited power of eminent domain similar to that enjoyed by the sovereign. Instead, Duquesne only has the power of eminent domain if the property to be taken is to be used for providing electric service.

The underlying Pennsylvania statute would seem to permit a public service corporation to exercise the power of eminent domain for any reason included on a statutory list.[14/] However, before a public service corporation can commence a condemnation action in the Court of Common Pleas, the Pennsylvania Public Utility Commission must first find that the service to be provided through the exercise of such powers is "necessary or proper for the service, accommodation, convenience, or safety of the public" and issue a certificate of need to that effect.[15/]

In this regard, both the courts and the Pennsylvania Public Utility Commission have limited the use of eminent domain by public service corporations. Pennsylvania courts have long held that private corporations may only use rights-of-way obtained by condemnation for purposes

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[14/]This list includes "the conveyance or transmission of messages or communications by telephone or telegraph for the public." 15 Pa. Cons. Stat. Ann. § 1511(a) (1995).

[15/]Id. § 1511(c).

related to their core business.[16] Moreover, Pennsylvania Public Utility Commission regulations make clear that an electric service company may only condemn property for purposes of providing electric service.[17]

The maxim "nemo dabit quod non habit"[18] should apply in this instance. At the very least, the Commission should clarify that its ruling only applies in instances in which existing state law gives an electric utility the right to condemn property for the use of a third party not engaged in providing electricity service to the public.[19] Finally, the Commission should not require an electric utility to exercise its power of eminent domain on behalf of a carrier which has the power of eminent domain in its own right under state law, or which could readily obtain such power if it were to apply to the public utility commission for a certificate of public convenience and necessity as a public service corporation.

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[16] A railroad obtained an easement right-of-way by eminent domain. It later permitted a telegraph company to set poles in that right-of-way. The telegraph company was deemed to be liable in trespass to the underlying fee owner, because the court held that the railroad could only condemn land for railroad purposes, not for communications purposes. See Pittock v. Central Dist. & Printing Telegraph Co., 31 Pa. Super. 589 (1906).

[17] See, e.g., 52 Pa. Code § 57.1 (1995) (defining "eminent domain application" as an application for Commission approval and issuance of a certificate "to acquire rights-of-way for the construction, operation, and maintenance of an aerial transmission line."); see also id. § 57.91 (requiring public utilities to provide landowners notice that the utility has the power to take property by eminent domain "for the construction of transmission lines").

[18] No one gives what he does not have.

[19] Moreover, if the Commission persists in requiring utilities to use the power of eminent domain on behalf of telecommunications carriers, the Commission should clarify that the utility's obligation is satisfied by the initiation and diligent prosecution of an eminent domain action, or the Commission should explicitly preempt the authority of state courts and agencies to determine the need for condemnation, such as the authority exercised by the Pennsylvania Public Utility Commission to approve or disapprove a certificate of need.

IV. THE COMMISSION SHOULD CLARIFY ITS NOTICE AND COMPENSATION PROVISIONS WITH RESPECT TO MODIFICATIONS TO FACILITIES WHICH ARE NOT CAUSED BY THE FACILITIES OWNER OR ANY ATTACHING ENTITY

A. Modifications Required by Government Agencies

The rules adopted by the Commission with respect to modifications assume that all modifications are initiated by the facilities owner, by a present attaching entity, or by an entity applying for a new attachment.[20/] In fact, many modifications are required by governments and governmental agencies which are not parties to the attachment agreement. A typical government-initiated modification requirement is the widening of a road which requires the distribution poles alongside the existing roadway to be relocated.

The Commission should make two clarifications here. First, if the government does not give the utility sixty days notice for such modifications, the utility will be unable to provide sixty days notice to its attaching entities. In such instances, the Commission should require utilities to give only as much notice as is practical under the circumstances, permitting the utility a minimum of ten days to provide such notice. This clarification is necessary because such relocations do not fall within the normal use of either the word "emergency" or "routine maintenance," which are currently the only two exceptions the Commission provided for circumventing the sixty-day notice requirement.

Second, the Commission should clarify its cost allocation rules to anticipate this very routine situation. As presently written, the Commission's rules require only those parties which "initiate" a modification or for whose "specific benefit" a modification is made to share in the cost

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[20/] See First Report and Order, slip op. at 581 ¶¶ 1207-1213.

thereof.[21] Attaching entities are quite likely to insist that modifications required by government agencies are not initiated by them, and do not inure to their specific benefit, and therefore refuse to pay a proportionate share of the cost of moving the distribution poles and transferring their attachment to the newly-set poles, insisting that the utility bear the entire cost. This would be an unfair and irrational result, and utilities should not be required to engage in lengthy and costly complaint proceedings to avoid it. The Commission should clarify that, just as a utility's decision to set its poles next to a road in the first instance involves assuming the business risk that the government might someday require them to be relocated, the telecommunications carrier's decision to attach its facilities to that pole involves assumption of the same business risk. In any event, the relocation does "specifically benefit" the telecommunications carrier, because it allows the carrier to maintain continuity of service. For these reasons, the Commission should clarify that the utility and all attaching entities must share in the cost of relocating the facility itself based on the ratio of useful space occupied by each, plus pay the entire cost of moving their own attachments from the old pole to the new pole.[22]

B. Recovery of Make-Ready Costs From Future Attaching Entities

Clarification is also required with regard to the recovery of make-ready costs from future attaching entities that take advantage of an increase in the capacity of a facility.[23] First, with

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[21] See id. at 581-82 ¶¶ 1211-1213.

[22] This assumes, of course, that the capacity of the facility is not expanded at the same time. If it is, the capital cost of the expansion space (plus a portion of the relocation costs according to the ratio of the amount of usable expansion space divided by the total usable space on the new pole) should be allocated among entities benefiting from the expansion space as described in the First Report and Order, slip op. at 581-82 ¶ 1211.

[23] See id. at 582-83 ¶ 1214.

hundreds of thousands of distribution poles and other facilities in service, the Commission should recognize that record keeping requirements will be extremely burdensome. The Commission should clarify that it is the entity desiring to avail itself of possible reimbursement from future attaching entities -- and not the utility (unless it wanted to avail itself of this provision) -- that is required to maintain pertinent records. Additionally, the Commission should permit the entity maintaining such records to utilize an average of its make-ready costs (rather than actual pole-by-pole make-ready costs) as a proxy, if desired. Moreover, the entity desiring such future reimbursement should be able to selectively target certain facilities, and not be forced into an all-or-nothing choice.[24/] Finally, some cut-off period should be established. There is some point in time beyond which the installation of excess capacity is no longer a reasonable investment-backed expectation but mere speculation. As the FCC's rules are currently written, a facility owner could seek reimbursement of make-ready costs from an entity attaching to a modified facility twenty or more years after the modification. A limitation period of five years for overhead facilities and ten years for underground facilities would seem to strike a reasonable balance.

C. Allocation of Make-Ready Costs When a Utility Corrects Preexisting National Electrical Safety Code Violations

The Commission determined that "a utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will

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[24/]For instance, a utility or a carrier may not wish to bother with maintaining historical make-ready cost data on pole modifications, because the make-ready costs are typically quite modest (often less than $1000) and because the amount of future reimbursement would not justify the cost of maintaining this data in addition to the data which it will be required to maintain to execute the Commission's notice rules. However, if the utility or carrier had to pay for digging up a central business district street to lay additional conduit, at a cost of $100,000 or more per mile, it may well wish to keep records on that specific project to recover those make-ready costs from entities which take advantage of that modification in the future.

be deemed to be sharing in the modification and will be responsible for its share of modification costs."[25/] The Commission should clarify this ruling in two respects.

First, the National Electrical Safety Code ("NESC"), the applicable safety code, is a construction code, and not a code of continuing applicability.[26/] If an installation is in compliance with NESC at the time of its construction, it will be in compliance with NESC even if NESC is subsequently changed. The utility is required to bring its installation into compliance with later changes to NESC only if it reconstructs the installation. Otherwise, the installation is permanently grandfathered and no NESC violation is present.[27/] In such an instance, a third-party request for the utility to modify or expand the facility would in fact be the sole cause for the requirement to rearrange facilities to comply with the current NESC provisions. The Commission should clarify that before the utility is required to share in make-ready costs under ¶ 1212, an actual violation of NESC (i.e., noncompliance with NESC at the time the utility built its facilities) must exist, and that a grandfathered condition does not trigger the requirement to share in make-ready costs because it is not violation.[28/]

[25/]Id. at 582 ¶ 1212.

[26/]Institute of Electrical and Electronics Engineers, Inc., National Electrical Safety Code § 1.013.A.1 (1993) ("NESC").

[27/]Id. § 1.013.B.2.

[28/]Whether there is a violation should only affect the allocation of make-ready costs (i.e., the capital cost of expanding the facility, etc.). Duquesne is not suggesting that the incremental cost of rearranging utility attachments should be included in make-ready costs; clearly, the utility should bear its own actual rearrangement costs, at least to the extent that they exceed the cost of transferring the utility's attachments as-is to the new facility.

Second, even if there is a violation, the utility should not be required to contribute to make-ready costs if the violation could have been corrected on the old facility without expanding the capacity actually used by the utility. For instance, assume that a utility has three cross arms on a pole, using ten total feet and that NESC prescribes a minimum distance of three feet between crossarms. If only two feet clearance exists between the top two crossarms, whereas five feet clearance exists between the middle crossarm and the bottom crossarm, the utility could correct this violation on the existing facility by moving the middle crossarm down one foot, without using any additional space on the pole. If a new attaching entity were to require the pole to be expanded by five additional useful feet, it would be fundamentally unfair for the utility to be required to contribute to make-ready costs pertaining to the capacity expansion -- because the expansion would be caused solely by the new entity.

V. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO PERMIT NONUTILITY WORKERS TO WORK ON UTILITY SYSTEMS, OR CLARIFY TRAINING REQUIREMENTS AND QUALIFICATION PROCEDURES AND PERMIT THE UTILITY TO INSIST ON REASONABLE INDEMNIFICATION

The Commission determined that utilities may insist that "individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utilities own workers, but the party seeking access will be able to use any individual workers who meet these criteria."[29/]

The Commission should reconsider this decision, because it seriously compromises safety (especially in manholes and underground ducts) and has the potential to seriously affect the

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[29/] Id. at 568 ¶ 1182.

reliability of utilities' transmission and distribution systems. Duquesne's employees undergo continual training and updates. Although training (confined space, working in the vicinity of energized lines and equipment, etc.) can be provided to nonutility workers, they will not undergo the continual training that a utility worker undergoes. Duquesne's workforce is exposed to the potential dangers of the work every day and has witnessed first hand the outcome of cable failures. This experience promotes a keen awareness of safety. The communications worker installing communications equipment in an electrical environment will not have the same awareness. From the standpoint of underground utility work, Duquesne's workers are in constant communication with the operations control center and are immediately informed if an emergent operational condition presents a greater-than-usual hazard. Communications workers would need to make similar arrangements and not enter the underground system without the knowledge and consent of Duquesne's operations control center for each and every ingress.

If system reliability is degraded, customers will blame the electric utilities and not the telecommunications carrier whose workers actually caused the problem. The potentially high societal price in terms of lost productivity in case of even a limited, short-duration power outage seems wholly out of proportion to the benefit cited by the Commission of avoiding disputes over the rates to be paid to workers. For these reasons, the Commission should reconsider its decision to force utilities to permit nonutility workers on its system.

However, if the Commission decides not to reconsider its decision, clarification is required in order to avoid predictable and unnecessary disputes. First, the Commission should clarify that utilities have reasonable discretion to establish training requirements, so long as those training

requirements are applied in a nondiscriminatory manner to both utility and telecommunications carrier workers. Second, the Commission should confirm that the term "training" includes not only formal lecture and practical skills training, but also reasonable experience in actually performing the required work. Third, the utility should be able to require the telecommunications carrier to demonstrate its workers qualifications to the utility's reasonable satisfaction through some reasonable test or practical demonstration requirement. The utility must be able to protect its customers' interest in reliable electric service by assuring itself that carrier personnel working on its system are actually qualified. Finally, the utility must be able to insist that the telecommunications carrier indemnify the utility (or post a bond) against damage to the utility's system caused by the carrier's workers, as well as against personal injury suits by the carrier's workers.

VI. GIVEN THE INNOVATIVE ATTACHMENTS SOUGHT BY TELECOMMUNICATIONS CARRIERS, THE COMMISSION SHOULD CLARIFY WHAT IS MEANT BY AN "ATTACHMENT"

Telecommunications carriers are seeking increasingly sophisticated and innovative attachments. Examples include fiber optic cable wrapped around an existing coaxial strand, in-line amplifiers and other equipment installed mid-span between distribution poles, wireless antennae, microwave dishes, and so forth.

Many of these innovative attachments impose a burden on the utility in question in excess of the burden imposed by attachment of a single coaxial cable. For instance, in Pittsburgh, where winter precipitation often comes in the form of ice or snow rather than rain, the burden imposed on a pole by a fiber-wrapped coaxial cable is many times the burden imposed by a single cable attachment. This is because the water is retained in the crevices of the wrapping, freezes, and

presents an additional weight and wind load. The additional burden could preclude the ability of a facility owner to permit later attachments (because the pole's weight-bearing capacity is exhausted), even if physical attachment space remains on the pole. If the complex attachment is defined as a single "pole attachment," payment in proportion to burden is not received by the owner of the facility which must bear the burden.

This problem can be alleviated by the Commission clarifying that the number of pole attachments a given attaching entity makes is not necessarily determined by the number of physical attachments made to the pole, but by determining the equivalent burden (in terms of a single wire attachment) supported by the pole. Alternatively, the Commission could defer this issue to the forthcoming Notice of Proposed Rulemaking on pole attachment rates, by indexing the presumptive space taken on the pole (currently deemed to be one foot) by a factor calculated with respect to weight and wind loads.

VII. THE COMMISSION SHOULD CLARIFY THAT TELECOMMUNICATIONS CARRIERS ARE REQUIRED TO INFORM UTILITIES BEFORE THEY MAKE AN ATTACHMENT AND PHYSICALLY LABEL THEIR ATTACHMENTS

In its Comments, Duquesne requested that the Commission make clear that telecommunications carriers must gain utility concurrence before making attachments to utility facilities, and should be required to label their facilities.[30/] The Commission did not address this point.

Duquesne requests that the Commission address its concern and issue a clarification requiring telecommunications carriers to obtain utility concurrence before making attachments to utility facilities. There are a number of reasons this is important. First, under Commission rules

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[30/]See Comments of Duquesne Light Company at 25 (CC Docket No. 96-98 May 20, 1996).

and existing pole attachment agreements, rent is calculated by multiplying the number of attachments by the rate per attachment. Unauthorized attachments are a conversion of utility property and must not be tolerated. Second, unauthorized attachments place a weight and wind burden on utility facilities. Safety of the general public, which the Commission is charged to promote in Section 1 of the Communications Act of 1934, as amended, requires that utilities be afforded the opportunity to assure that the facilities concerned can safely support the proposed attachments. Third, the extensive notice requirements enacted in the Telecommunications Act of 1996 and implemented in the Commission's rules adopted in this docket require that utilities maintain accurate databases. This is impossible unless telecommunications carriers are required to obtain utility concurrence prior to making attachments. Fourth, the utility is now under legal obligation to respond quickly to requests for attachments. The utility cannot respond to such requests within the time permitted by the Commission if it cannot trust its database and must physically inspect every facility to ascertain whether unauthorized attachments have used all available capacity. Finally, unless attachments are labeled, the utility will not know what company to call in case of the need for rearrangements or emergencies.[31/]

The Commission's clarification should make clear that the utility has the power to require unauthorized attachments to be removed, pending proper notification procedures. Moreover, a telecommunications carrier which follows proper notification procedures should be given priority over the attachment of a squatter (pending facility expansion, if feasible), if capacity does not exist

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[31/]The Commission should note that even if the database correctly identifies which entities attach to each pole, as a result of a physical inspection of its facilities the utility may have occasion to contact the owners of certain attachments to correct code problems, etc.

for both. The utility should be permitted to collect back-rent from the date that the unauthorized attachment was made, or from the date that the carrier concerned made its first attachment to the utility's system (if the date of the unauthorized attachment cannot be ascertained). Finally, if a telecommunications carrier consistently makes unauthorized attachments, it should be required to reimburse the utility for a physical audit to ascertain its actual attachments, and, if violations continue to occur, should be subject to removal of all its attachments upon order of the Commission upon complaint.

VIII. TECHNICAL CLARIFICATIONS

A. The Commission Should Clarify Which Version of 47 C.F.R. §§ 1.1402(d) and 1.1416(b) Is Effective

The Commission released two versions of 47 C.F.R. §§ 1.1402(d) and 1.1416(b) in CC Docket No. 96-98 and CS Docket No. 96-166. Because of differences in the order of adoption and release of the two orders (CC Docket No. 96-98 was adopted prior to CS Docket No. 96-166, but the order in CS Docket No. 96-166 was released first), confusion exists as to which version of Section 1.1402(d) and 1.1416(b) the Commission intends to be the final text. The Commission should issue a clarification to resolve such confusion, and ensure that the Government Printing Office publishes the correct text in the Code of Federal Regulations.